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No. 94-1794

In The Supreme Court of the United States

October Term, 1994

DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased,

Petitioners,

v.

ROBERT FICANO, Sheriff of Wayne County, and THE COUNTY OF WAYNE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

AND APPENDIX

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHERE AN OFF-DUTY DEPUTY SHERIFF INJURES MEMBERS OF HIS FAMILY DURING A DOMESTIC DISPUTE, CAN HIS GOVERNMENTAL EMPLOYER BE HELD CONSTITUTIONALLY RESPONSIBLE FOR HIS PERSONALLY MOTIVATED CONDUCT UNDER 42 U.S.C. § 1983 WHERE PETITIONERS RELIED ON ALLEGATIONS OF "DELIBERATE INDIFFERENCE" TO SATISFY EACH OF THE ELEMENTS OF THE § 1983 CAUSE OF ACTION BUT WHERE

(1) THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT RESPONDENT HAD ACTUAL KNOWLEDGE OF THE ALLEGED VIOLENT PROPENSITIES OF THE DEPUTY AND PETITIONERS FAILED TO PRESENT EVIDENCE OF ANY INCIDENTS OF ASSAULTIVE CONDUCT BY OTHER DEPUTY SHERIFFS;

(2) PETITIONERS ERRED IN RELYING ON THE ALLEGED "DELIBERATE INDIFFERENCE" OF RESPONDENT TO SATISFY THE REQUISITE CAUSAL CONNECTION BETWEEN THE ALLEGED POLICY OR CUSTOM AND THE ALLEGED CONSTITUTIONAL VIOLATION; AND

(3) THE DEPUTY'S CONDUCT DID NOT CONSTITUTE "STATE ACTION" AND NO CONSTITUTIONAL DUTIES WERE OWED BY RESPONDENT TO PROTECT THE DEPUTY'S FAMILY FROM THE DOMESTIC VIOLENCE?

LIST OF PARTIES

Petitioners Diana Davis
and Tod A. Wilson are individuals.

Respondent Robert Ficano
is the duly elected Sheriff of Wayne County, Michigan.

The County of Wayne
is a political subdivision of the State of Michigan which was dismissed from this action by order dated December 17, 1986.

There is no parent or subsidiary company to be listed under Rule 29.1

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DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased,

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Michigan Court of Appeals is reported at 201 Mich. App. 572; 507 N.W.2d 751 (1993). Petitioners' Delayed Application for Leave to Appeal was denied by the Michigan Supreme Court at 447 Mich. 959 (1995), reconsideration denied.

JURISDICTION

The opinion of the Michigan Court of Appeals was entered on September 20, 1993. Petitioners filed a Delayed Application for Leave to Appeal to the Michigan Supreme Court and Respondent thereafter filed a timely Cross-Application for Leave to Appeal. These applications were denied by the Michigan Supreme Court on November 16, 1994. Petitioners thereafter filed a timely Motion for Reconsideration of the order denying

delayed leave to appeal, which motion was denied on January 31, 1995. Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). However, this Court does not have jurisdiction to review the issues sought to be presented by petitioners because they were not properly and timely raised below.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation and application of 42 U.S.C. § 1983:

United States Code, Title 42:

> **§ 1983. Civil action for deprivation of rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

To the extent that petitioners have relied on any specific constitutional provision in support of their case, it appears they have relied generally and variously on the Fourteenth Amendment to the United States Constitution:

United States Constitution, Amendment XIV:

> **§ 1. Citizenship rights not to be abridged by states.**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Contrary to petitioners' inclusion of the Fourth Amendment to the United States Constitution in their Petition pending before this Court, petitioners have never seriously relied on the Fourth Amendment in support of their assertion of § 1983 liability against respondent, they did not submit this case to the jury based on a Fourth Amendment theory, and they have never before articulated an alleged deprivation of rights protected by this Amendment.[1]

COUNTER-STATEMENT OF THE CASE

The principal issues presented to the Michigan Court of Appeals in this matter concerned the scope of the federal civil rights act, 42 U.S.C. § 1983, questioning whether that statute was broad enough to support a verdict holding that the Wayne County Sheriff was constitutionally responsible for the off-duty actions of one of his deputy sheriffs where those actions were taken against members of the deputy's family during a domestic dispute.

Rule 14.1(g) of the Rules of the Supreme Court of the United States requires that a Petition for a Writ of Certiorari contain a "*concise* statement of the case con-

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[1] **Notwithstanding the plethora of briefing which occurred in the Michigan appellate courts, perhaps the only reference made by petitioners to the Fourth Amendment is contained in their Motion for Reconsideration filed with the Michigan Supreme Court after that Court had denied the delayed application for leave to appeal.**

taining the facts material to the consideration of the questions presented." (Emphasis in original) Rule 14.1(h) requires that the statement of the case set forth the facts necessary to demonstrate that the federal questions raised in the petition were "timely and properly raised" in the state appellate courts. As discussed below, petitioners have not complied with either the spirit of Rule 14.1(g), or the letter of Rule 14.1(h).

Moreover, Rule 15.1 admonishes the respondent to "address any misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." It is difficult, if not impossible, to fully comply with this requirement because petitioners have consistently overstated the facts and miscited the law in an attempt to make it appear as if the legal theories espoused in the pending petition were both factually supported at trial, as well as legally sustainable as viable § 1983 theories. However, as discussed herein, these theories were neither factually supported nor legally recognized. Nor, for that matter, were the questions presented in this petition "timely and properly raised" below so as to preserve them for review on a writ of certiorari.[2]

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[2] Petitioners now contend that the Michigan Court of Appeals erroneously applied a subjective test to the "deliberate indifference" inquiry, rather than the objective test enunciated by this Court in *City of Canton* v. *Harris*, 489 U.S. 378; 109 S. Ct. 1197; 103 L. Ed. 2d 412 (1989), suggesting that the confusion evidenced by this alleged misapplication of *Canton* v. *Harris* justifies the granting of their Petition. This contention was not set forth by petitioners in either their Motion for Rehearing filed with the Michigan Court of Appeals, or in their delayed Application for Leave to Appeal filed with the Michigan Supreme Court. Rather, this argument first appeared in the Motion for Reconsideration filed with the Michigan Supreme Court following its denial of leave to appeal.

The second question presented by petitioners for review relates to the issue of causation, with petitioners contending that proof of deliberate indifference should also suffice to satisfy the independent

(*concluded on page 5*)

With respect to the requirement of Rule 14.1(g) for a concise statement of the case, the unanimous opinion of the Michigan Court of Appeals, reported at 201 Mich. App. 572; 507 N.W.2d 751 (1993), concisely sets forth the material facts of this case. However, petitioners have neither relied on the facts as set forth in that opinion, nor set forth their own concise and objective presentation of the material facts. Rather, petitioners have included a Statement of the Case which is argumentative, while appending the "Concise Statement of Material Facts and Proceedings" which was originally attached to their delayed Application for Leave to Appeal to the Michigan Supreme Court. Neither of these expositions fairly and objectively present this matter to this Court.[3]

The petitioners were injured on September 18, 1983, when they were shot by their husband/brother-in-law, Marc Davis, during the heat of a domestic dispute. They attempted to impose 42 U.S.C. § 1983 liability for their

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(*continued from page 4*)

element of causation. Since petitioners have consistently depended on "deliberate indifference" to satisfy *each* of the elements of a cause of action under 42 U.S.C. § 1983, including the existence of a policy or custom, causation, and the existence of a constitutional right, they have arguably preserved this issue. However, their position on causation has never been either clear or consistent. In their Motion for Rehearing before the Michigan Court of Appeals, for example, they took the position that all that was required to satisfy the causation element of this case was a "plausible nexus." (Motion for Rehearing, ¶10, p. 5) In their delayed Application for Leave to Appeal to the Michigan Supreme Court, petitioners contended that the element of causation was satisfied whenever the tortfeasor's conduct was "consistent" with the alleged policy or custom. (Brief in Support of Application for Leave to Appeal, p. 6)

3 Although respondent would otherwise have been content to rely on the facts set forth in the opinion of the Court of Appeals, and because it is virtually impossible to correct all of the misconceptions which may have been created by petitioners' Concise Statement of Material Facts and Proceedings, respondent has also appended the Concise Statement which was included in his Answer to the petitioners' Delayed Application for Leave to Appeal.

injuries on the Wayne County Sheriff because, although Marc Davis was admittedly off-duty at the time of the incident and was not acting in his capacity as a Wayne County Deputy Sheriff, Davis was an employee of respondent and the weapon he used to assault his family happened to be his service revolver.

Since the only connection that the respondent had to the shootings in this case was the fact that Marc Davis shot his family members with his service revolver, petitioners attempted to establish the requisite causal relationship in their appellate pleadings by claiming that when Officer Sanborn of the Garden City Police Department was first called to the scene of the domestic dispute, he would have arrested Marc Davis but that he could not do so because of the fact that Davis was a Wayne County deputy who was authorized to carry a gun. Thus, in their Concise Statement to the Michigan Supreme Court, petitioners stated that "[w]hen the Garden City police officer arrived, he was unable to confiscate Marc's weapon or arrest him for carrying it because of his status as a deputy sheriff" (Petition, A-29), and again, "Officer Sanborn, who would otherwise have arrested Marc Davis for carrying a concealed weapon, was unable to do so because Marc's status with the Department authorized him to possess the gun." (Petition, A-48)[4] Officer Sanborn's testimony, however, was to the contrary. He specifically testified that, regardless of Marc Davis' status as a deputy sheriff, he would have taken action against him if he had thought that Diana Davis was in any danger. (Tr. 4/19/89, 55-61)

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4 This contention was also continued in the body of the delayed Application for Leave to Appeal filed with the Michigan Supreme Court where, at page 56, the petitioners claimed that if Marc Davis had been any other person, he would have been arrested for possession of the gun and that it was "only because of the immunity from the concealed weapon criminal statute afforded by his continued employment by the Department as an armed deputy that Marc Davis was insulated from arrest." These factually and legally inaccurate assertions continue in the pending Petition.

She, however, assured him that there was no danger. (Tr. 4/19/89, 13, 15, 44, 59, 61) According to Officer Sanborn, he left because of the assurances of Diana Davis, and not because Marc Davis was a Wayne County Deputy Sheriff.[5]

Although more subtly, in their Petition to this Court petitioners have continued the improper innuendo concerning the import to Officer Sanborn of Davis' position as a deputy sheriff. At page 3 of the Petition, petitioners state that "[t]he potential for harm if unfit officers possess deadly force is well-known, since every officer is required to possess his/her gun 24 hours a day, *and state law immunizes off-duty officers from arrest for gun possession.*" (Emphasis added) Petitioners have not cited legal authority for this proposition, because there is none.

Likewise, at page 6, petitioners state that "Officer Sanborn left the home after determining that Marc Davis had authority to have a weapon because he was a deputy sheriff." While it is true that Officer Sanborn did learn that Marc Davis was a deputy sheriff before he left the home, the inference that this is why he left the home, or that he otherwise would not have left the home, is untrue, as discussed above.

In support of the theories presented at trial, petitioners relied almost exclusively on a number of incidents involving Marc Davis which petitioners argued evidenced that he was unfit to carry a weapon. In both the pending Petition, as well as in their Concise Statement of Material Facts appended to that Petition, peti-

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5 It may also be noted that Officer Sanborn did not testify that he would have arrested Marc Davis for carrying a concealed weapon if he had not been a deputy sheriff, as contended by petitioners. Rather, Officer Sanborn testified that had Davis not identified himself as a deputy sheriff, he would have asked to see his permit for carrying a concealed weapon and, if he had none, Davis might then have been arrested because of his illegal possession of a gun. (Tr 4/19/89, 14-15)

tioners repeatedly refer to the knowledge the respondent Sheriff allegedly possessed concerning this aberrant behavior, as if respondent had actual knowledge of these instances and therefore should have known (had constructive knowledge) that Marc Davis was a violent and unstable person who was likely to shoot members of his family during a domestic dispute.[6] In fact, however, while the behavior referred to by petitioners was, in some instances, known by some employees of the Sheriff's Department, most of the examples relied upon by petitioners were either known by no one in the Department at all, or known only by persons in non-supervisory positions who cannot be said to establish policy for the Department. (See discussion in Respondent's Appendix at A-7–A-10, A-13–A-17) As the Court of Appeals stated in its opinion, "Significantly, the inci-

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6 For example, petitioners' Concise Statement submitted to the Michigan Supreme Court, and appended to their Petition to this Court, contains the following statements: "Marc was a Wayne County Deputy Sheriff whose 8-year career was marked by numerous acts of bizarre conduct and violence *which were known to the Wayne County Sheriff's Department.*" (Petition, A29) (Emphasis added) "Marc Davis' physical abuse of Diana Davis *was known to the department* but never triggered any departmental response." (Petition, A37) (Emphasis added) Similarly, petitioners remarked that the activities of Marc Davis triggered no consideration by respondent, "*despite actual knowledge*, by numerous Sheriff's Department officers, of Marc Davis' misconduct." (Petition, A46) (Emphasis added)

Further, the pending Petition contains such statements as: "Despite the history of violence, Marc Davis received no counselling and no discipline, and remained armed." (Petition, p. 5) The implication of this statement is that the respondent was aware of the "history of violence." At p. 6, petitioners state that respondent "elected to conduct no investigation or discipline of Marc Davis despite his misconduct," as if this had been a conscious "election" of alternatives based on actual knowledge of the need for investigation or discipline. See also page 21 of the Petition where various incidents of misconduct were alleged to be "obvious," as if they had been actually known. Petitioners also claim, on page 21 of the Petition, that the past incidents of private violence against Diana Davis were actually known to respondent, although the facts do not support this assertion.

dents mentioned above were, for the most part, admittedly never reported up the chain of command and each person responsible for disciplining Davis testified that they had no knowledge of the alleged misconduct." (201 Mich. App. 572, 583) Although petitioners would like to present this case as one in which a history of misconduct was indisputably known by respondent, this is not such a case.

At pages 5 and 6 of the Petition, petitioners claim that respondent conducted no psychiatric counseling of deputies, further claiming that respondent conceded that this was a policy attributable to him. This is not true. While petitioners complained about the *type* of counseling which was available to deputies, they did not contend at trial that *no* counseling was afforded to deputies, and respondent never conceded that no counseling was provided because this was not true. Indeed, the evidence presented at trial clearly discloses the existence of counseling programs.

Furthermore, petitioners claim that the counseling program which was in effect "was so woefully inadequate that it had no paid professional staff at all." (Petition, p. 22, n.11) The insinuation is that the counseling was not being provided by professionals. This is not true. The same police-specific psychological treatment was available by trained professionals under both the program offered by respondent during the relevant time period, and the program which petitioners claim should have been offered. The only significant difference between the programs was that under the one advocated by petitioners, deputies were *always* referred to psychologists who were familiar with police officers' stress-related problems. (Tr. 4/19/89, 99-100; Tr. 4/20/89, 7-8, 11, 15-16, 62-67, 77-80, 97-99; Tr. 4/25/89, 123; Tr. 5/10/89, 73)

As set forth in the pending petition, the jury was instructed concerning the elements of § 1983 liability. It should be noted, however, that respondent objected to

the circuit court's instruction concerning deliberate indifference (Tr. 5/17/89, p. 128, *et. seq.*) because it allowed the jury to find deliberate indifference to a pattern of constitutional violations based on a single instance of assaultive behavior. This was one of the issues raised by respondent in its successful appeal to the Michigan Court of Appeals.[7]

The jury returned a verdict imposing § 1983 liability on respondent. Following the denial of his motion for judgment notwithstanding the verdict or new trial, respondent appealed to the Michigan Court of Appeals, contending, *inter alia*, that he was entitled to judgment in his favor because the plaintiffs' proofs were insufficient to establish *any* of the requisite elements of a 42 U.S.C. § 1983 cause of action (including the absence of a *constitutional* deprivation) and that the trial court had erred in its instructions to the jury regarding these elements. After extensive briefing and oral argument, the Michigan Court of Appeals released its opinion, reversing the judgment which had been entered against respondent, and remanding the case for entry of judgment in his favor. Although the Court of Appeals found that any constitutional deprivation was committed "under color of state law," it did not specifically address respondent's argument that there had been no *constitutional* violation. However, noting that "liability for an officer's off-duty conduct that results in death or bodily injury to citizenry may only be imposed where that officer's conduct is directly related to a policy, or lack of a policy, adopted with deliberate indifference to the

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7 The circuit court had refused respondent's request to include the following instruction to the jury regarding the showing necessary to warrant a finding that he had a custom or policy of acquiescing in unconstitutional conduct: "Isolated events will not establish a pattern of abusive behavior. Neither will mere recitation suffice to prove a policy or custom. Plaintiff must show why those prior incidents deserve discipline and how the misconduct was similar to that involved in the present case." (See Defendant-Appellant's Brief on Appeal, p. 39)

rights of citizens," (201 Mich. App., 581), the Court of Appeals reversed the judgment entered against respondent, specifically finding that (a) petitioners had failed to produce sufficient evidence of a relevant policy or custom; (b) petitioners had failed to produce sufficient evidence of deliberate indifference and had, at most, produced evidence of negligence; and (c) petitioners had failed to produce sufficient evidence of a causal link between the harm suffered by the petitioners and any alleged policy.[8]

Petitioners filed a delayed application for leave to appeal to the Michigan Supreme Court, contending that the Michigan Court of Appeals had erred when it found the evidence insufficient to support a finding of a policy or custom, created with deliberate indifference, which caused a constitutional deprivation. Respondent filed a cross-application for leave to appeal, asking that, if review were granted, the Court also review the elements of "color of state law" and "constitutional" deprivation. Leave to appeal was denied.

Petitioners now seek further review from this Court, contending that this case merits consideration concerning application of the § 1983 elements of deliberate indifference and causation. Also implicit in these issues is the threshold question of the existence of a constitutional deprivation, as recognized by the petitioners' formulation of their issues, as well as their (belated) attempt to identify a constitutional right implicated by their allegations.

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8 **Having so concluded, the Michigan Court of Appeals did not consider respondent's other, independent, allegations of error, which also supported a reversal of the judgment entered against it.**

REASONS FOR DENYING THE WRIT

WHERE AN OFF-DUTY SHERIFF INJURES MEMBERS OF HIS FAMILY DURING A DOMESTIC DISPUTE, HIS GOVERNMENTAL EMPLOYER CANNOT BE HELD CONSTITUTIONALLY RESPONSIBLE FOR HIS PERSONALLY MOTIVATED CONDUCT UNDER 42 U.S.C. § 1983 WHERE PETITIONERS RELIED ON ALLEGATIONS OF "DELIBERATE INDIFFERENCE" TO SATISFY EACH OF THE ELEMENTS OF THE § 1983 CAUSE OF ACTION BUT WHERE (1) THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT RESPONDENT HAD ACTUAL KNOWLEDGE OF THE ALLEGED VIOLENT PROPENSITIES OF THE DEPUTY AND PETITIONERS FAILED TO PRESENT EVIDENCE OF ANY INCIDENTS OF ASSAULTIVE CONDUCT BY OTHER DEPUTY SHERIFFS; (2) PETITIONERS ERRED IN RELYING ON THE ALLEGED "DELIBERATE INDIFFERENCE" OF RESPONDENT TO SATISFY THE REQUISITE CAUSAL CONNECTION BETWEEN THE ALLEGED POLICY OR CUSTOM AND THE ALLEGED CONSTITUTIONAL VIOLATION; AND (3) THE DEPUTY'S CONDUCT DID NOT CONSTITUTE "STATE ACTION" AND NO CONSTITUTIONAL DUTIES WERE OWED BY RESPONDENT TO PROTECT THE DEPUTY'S FAMILY FROM THE DOMESTIC VIOLENCE.

In this case the petitioners alleged that the conduct of the respondent Wayne County Sheriff caused them to suffer a wrong of constitutional magnitude. Since their case was brought pursuant to 42 U.S.C. § 1983, the liability of the Sheriff could not be premised solely on the fact that an injury was inflicted by one of his employees, or as a result of his negligence. As properly stated by the Michigan Court of Appeals, "[i]n order to establish such a claim against a municipality or an agency thereof, the plaintiff must show that a policy or custom tantamount to deliberate indifference for the constitutional rights of others actually caused the violation,"[9] citing *Canton* v. *Harris*, 489 U.S. 378, 381, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989), *Monell* v. *New York Department of Social Services*, 436 U.S. 658, 691, 98 S. Ct. 2018,

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9 201 Mich. App., 577.

56 L. Ed. 2d 611 (1978) and *York* v. *Detroit (After Remand)*, 438 Mich. 744, 758; 475 N.W. 2d 346 (1991).

Applying these proper standards, the Michigan Court of Appeals concluded that petitioners had failed to provide sufficient evidence to support a § 1983 cause of action. To have imposed liability on the Sheriff based on the record of this case would have made every governmental employer responsible for the off-duty, personally motivated, assaultive conduct of its employees who are either provided with weapons or trained in the use of force. The concluding remark of the Michigan Court of Appeals that "we are not ready to extend monetary liability to municipalities or other governmental agencies for employee conduct that occurs outside the scope of employment unless that conduct is very clearly motivated by official policies or customs to which the employee is expected to adhere"[10] is fully consistent with public policy and supported by United States Supreme Court precedent.[11] The appellate opinion implicates no questions requiring review and analysis by this Court.

In their Petition for a Writ of Certiorari, petitioners dispute the lower court's analysis of the evidentiary record. However, they can hardly dispute that, even assuming that a constitutional deprivation occurred in this case, they could only prevail on their § 1983 claim if they proved the existence of a policy or custom which both evidenced the Sheriff's deliberate indiffer-

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10 201 Mich. App., 589.

11 See, e.g., *Collins* v. *City of Harker Heights*, ___ U.S. ___; 112 S. Ct. 1061, 1067, 1070; 117 L. Ed. 2d 261 (1992) ["We did not suggest that all harm-causing municipal policies are actionable under § 1983 or that all such policies are unconstitutional. . . . Instead we concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. . . . The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions."]

ence to the rights of others and actually caused the constitutional deprivation at issue. The fatal flaw in petitioners' proofs lay in the fact that they attempted to satisfy these rigorous requirements by focusing almost exclusively on the question of deliberate indifference, variously arguing that proof of deliberate indifference may suffice to establish the relevant policy or custom, the constitutional right, as well as the causal link.[12] By erroneously focusing exclusively on deliberate indifference, petitioners ignored the other requisite elements of § 1983 liability. Moreover, and as found by the Court of Appeals, petitioners failed in their efforts to prove deliberate indifference, proving, at most, negligence.[13]

The arguments contained in the pending petition seem to suggest that proof of negligence should suffice, and that § 1983 liability may be imposed on respondent, even in the absence of any evidence that he either knew or should have know of widespread and flagrant constitutional violations resulting from specified policies or customs, or that he knew or had reason to know of a particular history of violent conduct associated with

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12 See, e.g., petitioners' Application for Leave to Appeal to the Michigan Supreme Court where, at pages 4- 5, they assert that proof of deliberate indifference itself establishes a constitutional deprivation ["Under the circumstances, injury which results from 'deliberate indifference' is a constitutional deprivation. . . . [T]he 'constitutional deprivation' element rises or falls with 'deliberate indifference' . . . and need not be addressed separately."] and page 10 where they equate deliberate indifference with proof of the policy or custom ["The Supreme Court recognized that inaction constituting 'deliberate indifference' qualifies as a 'custom' or 'policy' for § 1983 purposes."]

13 As more fully discussed, *infra*, the Michigan Court of Appeals also correctly concluded that petitioners had failed to prove the requisite causal link between any policy or custom evidencing deliberate indifference to constitutional rights and the alleged constitutional harm. Further, it properly rejected petitioners' assertion that the "code of silence" could constitute the relevant governmental policy: "Absent some evidence that the department deliberately furthered the code of silence, or was consciously indifferent to its existence, it cannot be said to be a departmental policy. On this record, there is no such evidence." (201 Mich. App., 584)

Marc Davis. Petitioners presented no such evidence and thus, were unable to prove their § 1983 claim on any of the permissible bases.[14]

A. The United States Supreme Court Has Already Distinguished "Subjective" Deliberate Indifference From "Objective" Deliberate Indifference And, Contrary To Petitioners' Assertions, The Michigan Court Of Appeals Applied The Proper Standard To The Record Of This Case And Concluded That Where The Evidence Was Insufficient To Establish That Respondent Had Actual Knowledge Of The Alleged Violent Propensities Of Marc Davis, And Where Petitioners Failed To Present Evidence Of A Pattern Of Similar Constitutional Violations, The Evidence Was Insufficient To Support A Finding Of Objective Deliberate Indifference.

Attempting to avoid the evidentiary deficiencies of their case, petitioners cite this Court's opinion in

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14 Petitioners now place primary emphasis on the alleged existence of a "custom." However, it was not until their "Supplemental Reply Brief," the third brief filed by petitioners with the Michigan Court of Appeals, that their focus shifted from proof of a policy to proof of a custom. Furthermore, the focus in the petition is on an asserted custom of a code of silence. Contrary to the representations contained throughout the Petition, a "code of silence" has not been recognized as a viable policy or custom for purposes of imposing liability under 42 U.S.C. § 1983. For example, petitioners cite this Court's opinion in *Brandon* v. *Holt*, 469 U.S. 464; 105 S. Ct. 873; 83 L. Ed. 2d 878 (1985) as a case in which liability was imposed upon a municipality for policies including "the inherently deficient nature of police administrative procedures involving the discovery of official misconduct." (Petition, p. 19) However, this was the opinion of the district court, not of the United States Supreme Court. The only issue presented to the Supreme Court in *Brandon* concerned the question of qualified immunity for officials sued in their official capacity. The Court specifically noted that it was not discussing the underlying merits of the claim or the validity of the plaintiff's legal theories: "As an alternative ground for affirming the judgment of the Court of Appeals, respondents argue that the record does not establish that petitioners' injury was caused by the kind of 'policy or custom' that 'may fairly be said to represent official policy' of the city of Memphis. . . . Because the Court of Appeals did not address this argument, we do not consider it. . . ." (469 U.S., 473, n. 25)

Farmer v. *Brennan*, ___ U.S. ___; 114 S. Ct. 1970; 128 L. Ed. 2d 811 (1994), as if it evidenced either error committed by the Michigan Court of Appeals or the need for additional clarification of § 1983 standards by this Court. In *Farmer*, *supra*, this Court discussed the standards for imposing liability for violations of the 8th Amendment, enunciated the test of deliberate indifference to be utilized in cases arising under the 8th Amendment, and differentiated that (subjective) test of deliberate indifference from the (objective) test for deliberate indifference set forth in *Canton* v. *Harris*, *supra*. The clarification of 8th Amendment law set forth in *Farmer*, *supra*, established a subjective standard of deliberate indifference to be used in cases arising under the 8th Amendment, while leaving intact the objective standard of deliberate indifference pursuant to which this case was reviewed by the Michigan Court of Appeals. In other words, *Farmer* did not alter the proof which was required by petitioners in this case; nor did it create a new standard by which the sufficiency of that proof was to be judged.

Petitioners assert, however, that the Michigan Court of Appeals did not apply the *Canton* v. *Harris* standard for deliberate indifference *which it cited*, but, rather, applied the yet to be enunciated test of deliberate indifference which, in *Farmer*, would be held applicable only to 8th Amendment litigation.[15] It is purportedly because of the alleged erroneous application of a subjective standard of deliberate indifference that petitioners seek review from this Court, suggesting that it evidences the need for clarification concerning the standard applic-

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15 The first time this asserted error was raised was in petitioners' Motion for Reconsideration following the Michigan Supreme Court's denial of their delayed application for leave to appeal. In neither their Motion for Rehearing before the Michigan Court of Appeals, nor in their delayed application for leave to appeal to the Michigan Supreme Court, did they complain about the alleged erroneous utilization of a subjective test of deliberate indifference. This question has not been preserved.

able to claims of municipal liability. In fact, however, the *Farmer* case has already provided the clarification needed in that area of law (8th Amendment claims) in which clarification was needed.[16]

Furthermore, contrary to petitioners' suggestion, the Michigan Court of Appeals did not require that petitioners' proofs demonstrate subjective deliberate indifference, but required nothing more than that required by *Canton* v. *Harris*: "The [*Canton*] Court further stated that the plaintiff must demonstrate that the need for training is so obvious, and the inadequacy so likely to

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16 In their Petition, petitioners attempt to make the case that additional clarification of the differences discussed in *Farmer* is needed by citing *Manarite* v. *City of Springfield*, 957 F.2d 953 (1st Cir. 1992) *cert denied*, 113 S. Ct. 113 (1992), and *Molton* v. *City of Cleveland*, 839 F.2d 240 (6th Cir. 1988), *cert denied*, 489 U.S. 1068 (1989), as cases which cite both 8th Amendment and 14th Amendment municipal liability cases with regard to the standard of deliberate indifference applicable to those cases. However, there is no argument that an improper standard was actually applied in either of these cases. Moreover, both cases were decided before *Farmer*, in which it was the *8th* Amendment litigants who were warned off the objective standard applicable to municipal liability. There is no indication that an impermissible subjective test is being utilized in 14th Amendment municipal liability cases and, to the extent that such cases exist, *Farmer* provides the needed clarification.

Gavin v. *McGinnis*, 866 F. Supp. 1107 (N.D. Ill. 1994), also cited by petitioners, was released only a few weeks after *Farmer*, with no reference to Farmer, and with no attempt to apply *Farmer*. It did not, in any event, apply an improper standard to supervisory liability.

Petitioners' citation to the unpublished opinion of the 6th Circuit Court of Appeals in *Garrett* v. *Gilless*, 1995 W.L. 16810 (6th Cir. (Tenn.)) is curious. Certainly that court was correct when, in the portion of the decision quoted by petitioners, it stated that liability cannot be predicated on mere negligence. Moreover, *Garrett* provides cogent support for respondent's position, discussed *infra*, that no constitutional duties were implicated in this case. Finally, the case at bar is even weaker than *Garrett* since, in *Garrett*, the defendant had knowledge of the ongoing domestic violence and no such knowledge was possessed by Respondent in the case at bar.

cause a violation, that an inference of deliberate indifference may be made." (201 Mich. App., 580)[17] However, petitioners presented absolutely no proofs with regard to any assaultive conduct by any deputy other than Marc Davis and, thus, there was no evidence to support a finding of objective deliberate indifference. If the Michigan Court of Appeals failed to refer to evidence supporting objective deliberate indifference, it was because no such evidence was offered at trial. Indeed, this case was tried by petitioners almost exclusively on the basis of various incidents involving Marc Davis; petitioners did not even attempt to demonstrate either widespread misconduct by other deputies or the Sheriff's resulting actual or constructive knowledge of the need for remedial action to avoid constitutional deprivations.

With respect to the proofs required for demonstrating a "city policy" of inadequate training, the *Canton* Court offered the following guidance:

> . . . It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the

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17 **The quotation included at page 15 of the pending Petition does not support petitioners' assertion that the Michigan Court of Appeals required actual knowledge. Moreover, it is incomplete, omitting the sentences immediately following the quoted portion, evidencing that either actual or constructive knowledge would suffice.**

need.[10] In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. [Footnote omitted]

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[10] For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, . . . can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

(489 U.S., 390)

In this case, however, petitioners never articulated a policy which was the equivalent of a failure to train police officers in the permissible use of deadly force. Thus, in order to prevail, it was necessary for them to present proofs that constitutional violations had so often happened in the past as a result of a particular policy of inaction that the city policymakers were deliberately indifferent when they failed to take necessary action to cure the situation. However, *no* proofs of prior violations were presented by petitioners. The focus of their proofs was exclusively on Marc Davis.

With regard to understanding the insufficiencies of the evidence in this case, and the fallacy of the petitioners' arguments with regard to that evidence, it should be noted that the only evidence of deputy misconduct presented by petitioners at trial related to Davis himself. There was no attempt to show widespread problems with the use of service revolvers by off-duty officers; there was no attempt to show wide-

spread problems with the use of service revolvers by off-duty officers; there was no attempt to show widespread problems regarding domestic difficulties with the deputies; there was no attempt to show widespread problems with the fitness of deputies to perform their duties. Without such evidence, and without evidence that respondent either knew or should have known of significant problems with Marc Davis himself, it was impossible for petitioners to demonstrate the disregard of an obvious danger. It is this lack of evidence which serves to distinguish this case from virtually every case on which petitioners seek to rely.

B. Petitioners' Proofs Failed To Demonstrate The Requisite Causal Link Between An Alleged Policy Or Custom Created As A Result Of Deliberate Indifference To Constitutional Rights And The Alleged Constitutional Deprivation In This Case; Proof Of "Deliberate Indifference," Standing Alone, Cannot Suffice.

Supreme Court precedent has made clear that proof of a § 1983 claim against a local government entails evidence of several independent elements, including a policy or custom, deliberate indifference of policymakers in creating that policy as evidenced by a pattern of similar assaultive constitutional violations resulting from the policy, *and a causal link between that policy and the constitutional deprivation actually suffered in the particular case*. Petitioners now ask this Court to retreat from the rigorous requirements set forth in cases such as *Oklahoma City* v. *Tuttle*, 471 U.S. 808; 105 S. Ct. 2427; 85 L. Ed. 2d 791 (1985) and *City of Canton* v. *Harris*, 489 U.S. 378, 109 S. Ct. 1197; 103 L. Ed. 2d 412 (1989), by announcing that the "direct causal link" between a municipal policy and a constitutional deprivation is satisfied by the same proof of deliberate indifference which was required to prove the existence of the policy or custom in the first instance.

In other words, petitioners contend that once the deliberate indifference of policymakers in creating a policy or custom is established, no separate proof of causation is required. Thus, in the circumstances of this case, petitioners would argue that as long they were able to demonstrate that the Sheriff was deliberately indifferent to the dangers inherent in his policies, they would not be required to prove that it was one of these policies which actually caused the injuries sustained by them during the domestic dispute. A Writ of Certiorari should not be granted to so undermine the law developed concerning the function of 42 U.S.C. § 1983. While deliberate indifference is a necessary element of a claim against a governmental entity, contrary to petitioners' argument, it alone is not sufficient.

As Justice Rehnquist warned in *Oklahoma City* v. *Tuttle* concerning the element of causation: "[I]f one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official." (471 U.S., 823) This warning is directly applicable to this case. If the Sheriff did not have a policy of issuing guns to his deputies, Marc Davis would not have been able to use a government sponsored gun to shoot his family. If the Sheriff had taken away Marc Davis' gun, he could not have used it to shoot his family. Yet, there is no "affirmative link" between any act of the Sheriff and the domestic shooting such that it can be said that the Sheriff "caused" the alleged constitutional deprivation. Surely the Sheriff would not have been liable if Davis had used one of his own guns, or the gun issued to his wife.

The opinion of the Michigan Court of Appeals concluding that the requisite causal link was missing in the case at bar is factually and legally correct. Even assuming that petitioners had established a policy evidencing deliberate indifference to constitutional rights, the Court of Appeals rejected the argument that such a policy caused the harm suffered by plaintiffs herein:

> . . . All evidence suggests that the violations herein were caused by personal differences between Davis and his wife. Davis was not acting in the course of his duties as a deputy sheriff and was not acting in furtherance of departmental goals. In fact, the only significant relationship that existed between defendant and the incident was that Davis and his wife were departmental employees and the instrument of deprivation was a department-sanctioned weapon. On this record, there is simply not enough evidence to suggest that defendant's failure to train, supervise, or provide specific services to its employees was the cause of the violations at hand.
>
> (201 Mich. App., 584)

C. Respondent's Alleged Failure To Protect Petitioners From Marc Davis While He Was Acting Solely In His Individual Capacity, And Was Not Acting Under Color Of State Law, Did Not Constitute A Violation Of Any Duty Imposed By The Federal Constitution; No Constitutional Rights Were Implicated And There Could Be No Liability Under 42 U.S.C. § 1983.

In order to impose liability against any defendant under 42 U.S.C. § 1983, it must first be established that that defendant, acting under color of state law, caused the plaintiff to suffer a constitutional deprivation. As this Court stated in *Baker* v. *McCollan*, 443 U.S. 137, 140; 99 S. Ct. 2689; 61L. Ed. 2d 433 (1979), "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" As tragic as this case may be, petitioners were not deprived of any constitutional rights by respondent.

Although this issue concerning the existence of a constitutional right has not been directly raised by the petitioners in the pending Petition, it has been an issue

raised by respondent throughout these proceedings, beginning in the state circuit court and continuing through the respondent's filing of a Cross-Application for Leave to Appeal to the Michigan Supreme Court. Moreover, the issue is implicit in the questions sought to be raised in the Petition: To what constitutional rights was respondent allegedly indifferent? To what constitutional deprivation was the policy or custom affirmatively linked? The existence of a relevant constitutional right has always been merely assumed by the petitioners — it has never been adequately articulated. In fact, there has been no constitutional deprivation in this case and its absence, standing alone, necessarily defeats petitioners' claim.

The facts relevant to this inquiry were not in dispute: When Marc Davis shot and killed his sister-in-law and wounded his wife and brother-in-law, he was not on duty as a Wayne County Deputy Sheriff, nor was he attempting to make an arrest or otherwise enforce the law. There is no dispute that the shooting occurred during the course of a purely domestic dispute. In fact, the only link these shootings had to respondent, Davis' employer, was the fortuity that he utilized his service revolver rather than one of his personal weapons.

Not only would it be unreasonable and violative of public policy to expect the Sheriff to control the off-duty conduct of his employees, but, as specifically relevant to this case, it was not constitutionally required. Although Marc Davis may have used his service revolver in this case, the analysis and result should be no different than if he had used Diana's gun, one which he owned himself, a knife, or his bare hands. The real question is whether the Sheriff had a constitutional duty to protect Marc Davis' family from Marc Davis, and the answer is "no."

The critical distinction between the element of constitutional harm and the other elements necessary for the

imposition of § 1983 liability was discussed by this Court in *Collins* v. *City of Harker Heights*, ___ U.S. ___; 112 S. Ct. 1061; 117 L. Ed. 2d 261 (1992) where it was made clear that the existence of a municipal policy or custom which caused harm to the plaintiff, *even when that municipal policy or custom was the result of deliberate indifference*, did not answer the question of a constitutional violation:

> . . . In this case, petitioner has used that term [deliberate indifference] to characterize the city's failure to train the employees in its sanitation department. We assume for the purpose of decision that the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents, but that assumption does not confront the question whether the complaint has alleged a constitutional violation. To that question we now turn.
>
> (112 S. Ct., 1068)

In the case at bar, petitioners never did adequately turn to that question, relying instead on the alleged existence of deliberate indifference to satisfy this element.[18] This could not suffice.

The required existence of a constitutional violation by the identified state actor was the element discussed

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18 **For example, in petitioners' July 24, 1992, Reply Brief in the Michigan Court of Appeals, responding to respondent's contention that no constitutional deprivation had been established, petitioners state, at p. 7: "The question comes down to whether the consequence (the harm) is 'fairly attributable' to the State. Thus, the State is deemed to have deprived a person of a protected right, and liability imposed under § 1983, when the State's culpability is established through deliberate indifference. See *Canton* v. *Harris*, *supra*." Moreover, on page 5, note 4 of their Delayed Application for Leave to Appeal to the Michigan Supreme Court, Petitioners specifically stated that "the 'constitutional deprivation' elements rises or falls with 'deliberate indifference' (Issue I B, *infra*), and need not be addressed separately."**

by this Court in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189; 109 S. Ct. 998; 103 L. Ed. 2d 249 (1989) and *City of Los Angeles* v. *Heller*, 475 U.S. 796; 106 S. Ct. 1571; 89 L. Ed. 2d 806 (1986), both of which support respondent's position that it was not legally possible to find him responsible under § 1983 for the injuries which resulted when an off-duty deputy shot the plaintiffs during the course of a domestic dispute. In both *DeShaney* and *Heller*, this Court found the critical element of a constitutional wrong committed by the relevant state actor to be missing, as it is also missing in the case at bar.

In *Heller*, no § 1983 liability against the County was established because the plaintiff failed to prove that an individual officer inflicted constitutional harm on the plaintiff. Likewise, in the case at bar, there was no underlying constitutional deprivation by an agent of the Sheriff acting under color of state law. Marc Davis was not acting under color of state law and thus, his conduct could not suffice to establish the existence of a constitutional duty.[19] As in *Heller*, no § 1983 liability was possible in the case at bar unless the plaintiff could establish a direct constitutional violation committed by either the Sheriff himself, or some agent *other than Marc Davis*.

Contrary to the position taken by petitioners throughout these proceedings, the existence of a policy or custom attributable to the Sheriff did not suffice as the constitutional deprivation. It is at this point in the

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[19] It was only before the Michigan Supreme Court, in order to avoid the conclusion that the element of a constitutional deprivation was missing, that petitioners sought to rely on Marc Davis as the relevant state actor. Indeed, at trial it was their position that the jury should not even be asked to decide whether Davis was acting under color of state law. However, petitioners failed to recognize the distinction between the color of state law requirement, and the independent requirement that the identified "state actor" be responsible for a deprivation of constitutional magnitude. If the "state actor" was the City, what constitutional duty did *it* breach?

analysis that the so-called "duty to protect," and this Court's decision in *DeShaney* becomes relevant because it answers the critical question: Did the Sheriff owe a substantive due process affirmative duty to petitioners?

In *DeShaney*, the Court rejected the plaintiff's argument that Joshua DeShaney's 14th Amendment due process rights were violated by the state when it failed to protect him against his father's violence:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . .
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.
>
> (489 U.S., 195-197)

Rejecting the *DeShaney* plaintiff's contention that a special relationship existed which imposed affirmative duties of protection on the state which might not otherwise exist, the Court concluded:

> . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
>
> (489 U.S., 200)

Thus, pursuant to *DeShaney*, a duty to protect exists only where the state affirmatively places the plaintiff in harm's way without the means of protecting himself/herself from the harm. As stated by the *DeShaney* court, it is the state imposed restriction on one's ability to protect oneself which constitutes the deprivation of liberty which may be actionable under § 1983. It is this analysis which is relevant to the case at bar because this is the analysis employed when the physical harm to a plaintiff is not inflicted by a state actor, and it is for this reason that whether or not Marc Davis was a state actor is analytically critical, although petitioners virtually ignored it.

As discussed above, one of the first questions in every § 1983 case is whether or not the governmental entity owed a constitutional duty to the plaintiff. It is only after this question is answered in the affirmative that one must undertake the other inquiries, such as whether or not a policy or custom exists which can be affirmatively linked to the alleged constitutional deprivation, thus satisfying the requirement of *Monell* v. *New York Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018; 56 L. Ed. 2d 611 (1978). In other words, *if* a constitutional duty is owed to

the plaintiff, a governmental entity can breach it and be subjected to statutory liability under § 1983 only through a policy or custom. However, the policy is not itself the constitutional deprivation.

Petitioners' analysis has focused almost exclusively on proof of a policy or custom which allegedly caused or allowed Marc Davis to act as he did. However, they failed to identify a relevant constitutional duty to which this policy or custom could be affirmatively linked and, thus, failed to pass the threshold burden of every § 1983 case.

CONCLUSION

A writ of certiorari should not issue to review the opinion of the Michigan Court of Appeals. That opinion is wholly consistent with this Court's decision in *City of Canton* v. *Harris*, *supra* and no clarification of, or retreat from, the standards set forth in that case is required or justified. Moreover, the insufficiency of the record to support the jury's imposition of § 1983 liability upon the Wayne County Sheriff is manifest.

Respectfully submitted,

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Dated: May 26, 1995

APPENDIX TO BRIEF IN OPPOSITION

• • •

EXCERPT FROM DEFENDANT-APPELLEE'S ANSWER TO DELAYED APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Filed May 7, 1994)

(DIANA DAVIS, Individually and as Next Friend of DANIELLE YVETTE MARIE DAVIS, a minor, and MARC ALEXANDER DAVIS, a minor, and TOD A. WILSON, Individually and as Personal Representative of the Estate of KIMBERLY SUE WILSON, Deceased, Plaintiffs-Appellants, Cross-Appellees, v MARC DAVIS, THE COUNTY OF WAYNE, and SHERIFF OF WAYNE COUNTY, Defendants-Appellees, Cross-Appellants, and SECOND INJURY FUND, Defendant — SC: 98819; COA: 122594; LC: 84-419385-NO)

* * *

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

This litigation arose as a result of a September 18, 1983 domestic dispute between defendant, Marc Davis, and his estranged wife, plaintiff-appellant Diana Davis, which ended when Marc Davis shot and wounded Diana Davis, shot and killed Diana's step-sister, Kimberly Wilson, and shot and wounded Kimberly's husband, Todd Wilson. Although it is undisputed that Davis was off-duty at the time and was not, in any sense, acting in furtherance of his official duties as a Wayne County Deputy Sheriff when he argued with his wife and shot his family, the plaintiffs sought to hold the Sheriff's Department *constitutionally* liable because the gun utilized by Davis was his department issued weapon and, it was alleged, the Department should have determined that Davis was mentally unstable and then should have

relieved him of his weapon at some point prior to the shooting.

As originally filed, the complaint alleged only a negligence theory of liability against Marc Davis and Wayne County. Plaintiffs added Sheriff Robert Ficano as a defendant, in his official capacity as head of the Wayne County Sheriff's Department, in their First Amended Complaint, alleging both negligence and 42 USC § 1983 theories of liability against him. However, on motions for summary disposition the circuit court dismissed plaintiffs' negligence claims against both Wayne County and Sheriff Ficano on the basis of governmental immunity (MCLA 691.1407 *et seq*). An order was entered on December 17, 1986, dismissing Wayne County from the litigation because the only claims directed against the County had been negligence claims, subject to the county's governmental immunity defense. Although concluding that plaintiffs' First Amended Complaint did not adequately state a 42 USC § 1983 claim against the Sheriff, it permitted plaintiffs the opportunity to amend their complaint. (Tr 12/12/86, 21-22, 49-51)

On January 7, 1987, plaintiffs amended their 42 USC § 1983 claim against the Sheriff, complained that their injuries had been caused by policies and practices of the Sheriff's Department, and alleged that the department did not adequately train its deputies concerning stress, that it failed to conduct ongoing psychological testing of its deputies, that it did not adequately supervise, train or discipline its deputies (including Marc Davis), and that it followed a "code of silence" with regard to unlawful conduct of its deputies. Defendant thereafter repeatedly and unsuccessfully moved for summary disposition, contesting the legal sufficiency of plaintiffs' § 1983 claim, and arguing, *inter alia*, that the § 1983 requisite elements of "color of state law" and/or a constitutional deprivation were missing in this case.

Following the plaintiffs' dismissal of Marc Davis, this case proceeded to trial against the only remaining

defendant on the only remaining theory of liability — that the Wayne County Sheriff's Department had violated plaintiffs' constitutional rights under the 5th and 14th Amendments to the United States Constitution by depriving them of life, liberty and property without due process of law. At that trial, plaintiffs attempted to establish that Marc Davis was not fit for duty, that the defendant should have known of the incidents which indicated his unfitness for duty and that, with that knowledge, it should have taken away his gun.

At trial, plaintiffs specifically argued that the defendant should have (1) conducted pre-hiring psychiatric screening of applicants for deputy sheriff positions; (2) conducted annual, written performance evaluations of all departmental employees; (3) instituted a counseling program specifically geared to the unique needs of deputy sheriffs; and (4) discovered and investigated incidents of conduct/misconduct committed by Marc Davis (including his marital problems with Diana Davis) by breaking the alleged "code of silence" existing within the department and taking appropriate disciplinary action against Davis. It was their position that the fact that Davis was off-duty and not exercising his police powers when he shot plaintiffs during a domestic dispute did not bar their § 1983 claim.

Defendant argued that it did not know and could not have known of many of the incidents of alleged aberrant behavior relied upon by plaintiffs to demonstrate Marc Davis' mental instability and that it had investigated those few incidents which were reported. It further argued that the incidents were isolated, occurred sporadically throughout the course of Davis' 8 year career with the Sheriff's Department, and, even if known, would have given no indication that Davis was unfit to carry a gun or that he would use his gun off-duty to shoot his family members during a domestic dispute. Defendant denied that pre-hiring psychiatric screening, written performance evaluations, or a deputy sheriff

specific counseling program would have prevented the shootings in this case, and denied that it ever adopted or condoned a "code of silence" concerning improper conduct committed by deputies. Moreover, it denied that it had either a duty or a right to pry into its employees' personal affairs unless the employee reported the problem or the personal problem affected the employee's job performance: Neither of those indicia were present in this case. Defendant further maintained that the shooting was the culmination of a purely personal conflict of which it had no knowledge and that, under the circumstances of this case, it could not be held responsible for a wrong of constitutional magnitude.

The case proceeded to trial, during which plaintiff presented evidence concerning (1) the relationship between Marc Davis and Diana Davis; (2) the shooting incident itself; (3) other incidents of alleged aberrant behavior involving Marc Davis; and (4) alleged "policies" or "customs" of the Department which, it was contended, could be causally linked to the shooting of plaintiffs. No attempt was made to prove the existence of wrongdoing, similar or otherwise, by other Wayne County deputies.

Relationship Between Marc and Diana Davis

Marc and Diana Davis met in October of 1976, and were married seven months later on May 28, 1977. (Tr 5/3/89, 125, 134; Tr 5/8/89, 20-21) Diana described Marc as having been a "perfect gentleman" during the period prior to their marriage: he never displayed a temper or appeared jealous and had never been physically aggressive. (Tr 5/3/89, 132, 135-136; Tr 5/8/89, 21) However, while on their honeymoon Marc struck Diana for allegedly flirting with another man and the arguments and physical fights between them escalated over the course of their marriage. Marc constantly accused her of having affairs and physical violence sometimes

erupted during these arguments. Diana testified that Marc would hit her if she responded in a way he did not like, or if he did not like her answers. (Tr 5/3/89, 136-138, 140; Tr 5/4/89, 66; Tr 5/8/9, 35) Diana also admitted that she knew how to make Marc angry, i.e. she "knew which string to pull" and "which buttons to push" and she knew how he would react in an argument. (Tr 5/8/89, 38)

During their marriage, the Davis' had two children and a major source of contention within the marriage was Diana's desire to continue working. Although Marc wanted a "traditional" family where the wife stayed home and cared for the children, Diana did not agree. Although she quit her job in 1978 before their first child was born, after the delivery she wished to return to work and Marc reluctantly agreed, but only if she obtained a job with the Wayne County Sheriff's Department. (Marc had been a Wayne County Deputy Sheriff since 1975.) (Tr 5/3/89, 143-145; Tr 5/8/89, 22-24, 68-69) Classified as a Police Officer I, Diana began working at the Westland annex of the Wayne County Jail in May of 1979. Although Marc was often assigned to work in the same jail annex, they were never assigned as partners and had little contact with each other. (Tr 5/3/89, 150; Tr 5/8/89, 23-24)

On August 1, 1983, Diana reported to the police academy to begin her training to become a fully certified police officer. She testified that Marc was not happy that she was attending the academy because her job as a deputy sheriff would give her more independence. (Tr 5/4/89, 27, 77) Marc never liked the fact that Diana was working and would be particularly upset if she was not home when he arrived home from his afternoon shift. Diana testified that she would go out drinking with her friends and co-workers after her afternoon shift and the Davises' discussions on this subject sometimes led to arguments and fights. (Tr 5/3/89, 161; Tr 5/8/89, 32-34, 69-70)

Describing their fights, Diana testified that Marc always struck her with an open hand, would occasionally choke her, and that she always fought back vigorously, hitting and scratching. (Tr 5/3/89, 140, 143; Tr 5/8/89, 38-39, 61) She described two instances when Marc pulled a gun on her: In 1978, during an argument while she was pregnant, Marc struck her a few times and then pulled out his gun, put it to her head, and then choked her until she lost consciousness. (Tr 5/3/89, 142-143) The second instance occurred in 1982 or 1983, when Marc struck her a few times, threw her on the bed, pointed a gun and told her to remove her clothes. When she refused, he tore off her clothes and raped her. (Tr 5/4/89, 66-67; Tr 5/8/89, 25-32)

Diana testified that Marc owned several shotguns and handguns in addition to the three service revolvers issued to him by the Sheriff's Department. She stated that she never thought that he would shoot her, even on the night of the shooting. (Tr 5/4/89, 79, 117; TR 5/8/89, 27-29)

In May, 1983, Marc struck Diana in front of their children for the first time and Diana moved out of the house because she did not want her children to believe that it was all right to hit or be hit. She moved in with her step-sister, Kimberly Wilson, and Kimberly's family. Several weeks later, Marc agreed that the children could move in with Diana. (Tr 5/3/89, 139-140; Tr 5/4/89, 57-58; Tr 5/8/89, 39) During this period, Diana allowed Marc to pick up the children whenever he wanted and she never worried about their safety with him. He would see Diana two or three times a week, swear that he would change and beg her to come home. When she refused, an argument sometimes followed. On a few occasions, Diana went with the children to visit Marc, and she also saw Marc alone and had sex with him a few times, including the night before the shooting. (Tr 5/3/89, 59; Tr 5/4/89, 61, 64; Tr 5/8/89, 37-40) A few days before the shooting, Marc agreed to give her a divorce and custody of the children. (Tr 5/4/89, 59-60)

During the latter stages of their marriage both Marc and Diana were seeing other people. (Tr 5/8/89, 67) Diana described one occasion when she found a phone number in Marc's pocket, threatened to call the number, heard Marc pick up the phone and she beat him with it. (Tr 5/8/89, 61-63) Diana admitted that she was "romantically involved" with her long-time friend and confident, police officer Dan Longy and that, although Marc had accused her of infidelity, she had never admitted to it. (Tr 5/8/89, 35-37, 54)

Although Diana testified that she once suggested marriage counseling to Marc, he rejected the idea because he did not need someone telling him what his problems were. Diana did not seek counseling for herself because she did not believe that she needed it. (Tr 5/3/89, 142; Tr 5/4/89, 108; Tr 5/8/89, 58-59) Both plaintiffs' and defendant's psychiatric experts agreed at trial that Marc and Diana had a sadomasochistic relationship, explaining that Diana was a verbally aggressive person who provoked Marc, while Marc was a passive personality who reacted violently when he lost control. (Tr 5/1/89, 88-89; Tr 5/2/89, 29-30; Tr 5/15/89, 33-36, 149)

Extent of Co-Workers' Knowledge of Domestic Problems

Throughout their employment at the Sheriff's Department, neither Marc or Diana volunteered or disclosed anything about their marital problems to their supervisors. They discussed their physical fights only with a few co-workers who never formally reported the Davises' personal problems.

While on special assignment with the Marine Division patrolling the Detroit River, Marc was partnered with Larry Davis.[1] Beginning in April of 1983, Marc told Larry

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[1] **In fact, Marc received this appointment after application and an interview and was rated the most qualified applicant. (Tr 4/24/89, 107, 167-169)**

Davis that he was having a lot of marital problems and Larry Davis testified that Marc would be happy one day and sad the next, depending on how Diana was treating him. Marc confided to Larry Davis that he and Diana had physical fights and once began to cry, asking Larry Davis to hit him because he had hit Diana. (Tr 4/24/89, 115-117, 120-122, 128, 131) Larry Davis also testified that, against his advice, Marc (an ex-Marine) enlisted in a two-week Marine Corps training program in early August of 1983, in order to escape his problems and that when he returned, Marc confided that he had started to drink on the job. Larry Davis encouraged Marc to get a divorce. (Tr 4/24/89, 121-122, 125-126, 128, 131, 139; Tr 5/16/89, 30-31)

Larry Davis repeatedly testified that Marc's work performance was excellent and was, in no way, affected by his personal problems. He did not report Marc's marital problems to their supervisors because they were not affecting his job performance and were, therefore, none of the Department's business. He stated that Mark was trying to work out his problems on his own. (Tr 4/24/89, 116-127, 141) The day before the shooting, Marc had just had a fight with Diana when he helped Larry cut down a tree, splitting wood for 1½ hours without stopping. Although his hands were blistered and bleeding, he was in a much better mood. (Tr 4/24/89, 132, 142-143)

Diana testified that she did not volunteer or disclose any of her marital problems or physical fights with either her own or Marc's supervisors because she was afraid that it would jeopardize Marc's job and her own chances of successfully completing the police academy, although no one had ever told her she would lose her job if she reported fights. (Tr 5/4/89, 72-73, 120; Tr 5/8/89, 64, 68) She covered her bruises with makeup and sunglasses and while, occasionally, someone would remark about the bruises, she confided her marital problems only to two co-workers, Claire Parnell and Christine Dennard. (Tr 4/18/8, 108; Tr 5/2/89, 104,119; Tr

5/4/89, 72-74) She also casually told Sergeant Jim Reed, who was both a supervisor and a friend, that she and Marc had quarrelled and separated. According to Diana, she confided that information to Sergeant Reed only "as a friend". (Tr 4/27/89, 58, 77, 81; Tr 5/4/89, 119; Tr 5/8/89, 57-58)

None of these three officers reported Diana's problems to their supervisors. Deputy Parnell testified that she did not report the black eye and swollen lip she had observed on two or three occasions prior to May, 1981, because of Diana's assurances that she could handle the matter. (Tr 5/2/89, 104-105, 111-112) Likewise, Deputy Dennard saw no need to report the bruises she saw on three or four occasions between 1978 and 1982. (Tr 5/8/89, 71-75) Sergeant Reed explained that he felt that he had nothing to report since Diana did not say anything specific to him, he never saw any signs of physical abuse, and Diana did not ask him to make a report. (Tr 4/27/89, 57-60, 66, 68, 80-82)

In September, 1983, Diana's drill instructor at the academy, Officer Ron Proudlock of the Livonia Police Department, learned from a student that Diana had suffered an injury. When he called Diana into his office she did not appear distraught, but was wearing sunglasses and had some facial injuries. Although initially stating that she fell, she later admitted that she was having marital problems. Officer Proudlock knew about Diana's involvement with Officer Longy and believed that Diana was getting a divorce. He did not mention Diana's relationship with Officer Longy because he felt that it was none of his business. (Tr 4/18/89, 103, 108, 115-119, 123, 127; Tr 5/4/89, 73) Officer Proudlock escorted Diana to the offices of Sergeants Henry Hammond and Bobby Hawkins, employees of the Sheriff's Department. (Tr 4/18/89, 108-110, 127) He could not recall what he said to the sergeants, or their responses, and did not know what Diana told them after he left. (Tr 4/18/89, 116, 120, 126-128) He did not file a written report because he felt

that the sergeants could handle the matter, and that it involved personal, marital problems; he noticed no further injuries and heard of no further incidents. (Tr 4/19/89, 120-124) Sergeants Hammond and Hawkins could not recall the incident, but both testified that they would have reported any physical abuse if they had noticed it. (Tr 4/27/89, 92-93; Tr 5/16/89, 7-8, 14-15) Diana testified that she had reported an injury once while she was at the academy, but did not say to whom. (Tr 5/4/89, 73)

Subsequent to this incident, Diana approached Sergeant Jan Hartwell, the academy's training director, to explain that her grades at the academy were not up to par because she was having some unspecified family problems. Sergeant Hartwell testified that she noticed no bruises or signs of physical abuse on Diana. (Tr 4/19/89, 76-77, 96)

THE SHOOTING

During the evening of September 17, 1983, while off-duty, Marc Davis telephoned the Wilson home and told them that he would be stopping by to pick up his children. When he arrived at the Wilson home between 11:00 and 11:30 p.m., Diana was not there because she was at Officer Longy's house. When the Wilsons brought the children to Marc's car, he told them that he wanted to talk to Diana. (Tr 5/2/89, 79-82; Tr 5/8/89, 39-41, 59-60) Kimberly Wilson then called Diana at Officer Longy's and Diana returned home and called Marc. Although she refused to go with him for a drink or a cup of coffee, she agreed to talk to him, and Marc returned to the Wilson's home where Diana met him outside. (Tr 5/2/89, 82-83; Tr 5/3/89, 73-74; Tr 5/8/89, 40-41)

After being told by Kimberly that Marc was trying to force Diana to leave with him, Todd went outside to ensure that Diana was all right and found them involved in a physical fight. Todd intervened, threatened Marc, and was told by Marc to return to the house or he

would get hurt. Diana reassured Todd that Marc could not force her to leave because she had his car keys and Todd returned to the porch of the home and observed Marc and Diana talk in Marc's car. (Tr 5/2/89, 77, 83-85; Tr 5/3/89, 65-67, 68, 80-82, 91-92; Tr 5/10/89, 9-12)

Diana testified that Marc wanted her to come home but that she refused to do so until she saw a change in him. At one point he handed her his department issued .357 Magnum and asked her to kill him. She returned the gun to him. (Tr 5/4/89, 60, 116; Tr 5/8/89, 41-42) In the meantime, Kimberly had called the Garden City Police and Officer John Sanborn responded to the call, having been informed that the situation involved family trouble and possibly a gun. When he arrived at 12:45 a.m., Officer Sanborn observed Diana and Marc in Marc's car which was parked in the driveway. (Tr 4/19/89, 10-12, 54-55; Tr 5/2/89, 85; Tr 5/8/9, 64) According to Diana, she told Mark to hide his gun, and he did so. (Tr 5/8/89, 42-43)

When Officer Sanborn approached the driver's side (where Diana was seated) he saw Marc and Diana in a heated, but not hostile, domestic quarrel and informed them that he had been called because of family trouble possibly involving a gun. (Tr 4/19/89, 12-13, 54-55) Marc identified himself as a deputy sheriff and produced his badge and driver's license. Diana likewise identified herself as a deputy sheriff. (Tr 4/19/89, 13-14, 43-44, 55, 66) Since Officer Sanborn was worried that Marc was holding a weapon on Diana, he asked her to step out and to the rear of the car, and asked her how the situation was and if she wanted him to stay until Marc left. (Tr 4/19/89, 13, 56-59; Tr 5/8/89, 44-45) However, Diana assured him that everything was fine, that there was no danger, that she could handle the situation, and that there was no reason to stay. (Tr 4/19/89, 13, 59; Tr 5/8/89, 45)

Other police vehicles arrived and Todd Wilson talked to these officers, informing them that he did not want

to press charges against Marc, but that Diana might want to do so. These officers then joined Officer Sanborn and spoke to both Marc and Diana. (Tr 4/19/89, 60; Tr 5/2/89, 86-87; Tr 5/3/89, 68-69)

Although Marc told Officer Sanborn that he had a gun, Sanborn saw no gun. He testified that he would have arrested an ordinary citizen who was carrying a gun without a permit but that both Marc and Diana, as deputy sheriffs, were authorized to carry guns 24 hours a day. (Tr 4/19/89, 14-15, 33, 55, 57, 62) However, Officer Sanborn also testified that he would have taken some action against Marc, regardless of his status as a deputy sheriff, if Diana had been in any danger. (Tr 4/19/89, 56, 58, 61) Based on Diana's assurances that all was fine, the officers left the scene after about 10 or 15 minutes. (Tr 4/19/89, 13, 15, 44, 61; Tr 5/2/89, 86-87)

After the officers left, Diana returned to Marc's car while Todd observed them talking and yelling. When Diana returned to the house, she laughingly stated that Marc had threatened to "blow her away" if she left the car. (Tr 4/19/89, 49; Tr 5/2/89, 87-88; Tr 5/3/89, 74-76; Tr 5/8/89, 46-47)

Marc began to back his car out of the driveway, but stopped and pulled forward to Diana's car. He left his car and went to Diana's, opened her trunk and began to throw her belongings across the lawn. Diana then ran toward him, hitting and scratching him and tearing at his shirt. Todd and Kimberly Wilson were outside helping Diana pick up her things. Discovering Diana's .39 caliber service revolver in the trunk of her car, he asked whose gun it was and when Diana told him that it was hers, he threw it across the lawn. As the exchange was escalating, Todd Wilson walked Diana back a few feet, Kimberly Wilson began screaming at Marc, and Kimberly and Diana began picking up things from the lawn. (Tr 4/19/89, 49-50; Tr 5/2/89, 88-93; Tr 5/3/89, 77-78; Tr 5/4/89, 77, 115; Tr 5/8/89, 47-52)

Marc then went to the glove box of Diana's car and pulled out his .38 caliber service revolver which he kept in her glove box because he used her car several times a week. He returned toward his own car with the revolver in his hand, apparently intending to leave, when Diana and Kimberly began yelling at him again. Knowing that her threats would upset Marc, and later admitting that she had pushed one button too many, Diana screamed, "I'm going to take your job, your house, your kids, everything you ever worked for." Marc then stared at her in way that she had never seen before, assumed a combat stance and fired point blank at Diana. He then turned and shot both Todd and Kimberly Wilson. (Tr 4/19/89, 50; Tr 5/2/89, 93-97; Tr 5/3/89, 78; Tr 5/4/89, 78-79; Tr 5/8/89, 38, 52-53; Tr 5/15/89, 41)

"Incidents" Involving Marc Davis

Reckless Driving Ticket. Marc received a reckless driving ticket in 1969, five years before he was hired by the Sheriff's Department. The circumstances of the ticket were never detailed at trial. (Tr 4/24/89, 76-77, 99)

Marine Corps Experience.

Marc successfully served in the Marine Corps before applying to the Sheriff's Department. (Tr 4/24/89, 127)

Chicken Blood Incident.

In 1975 or 1976, Deputy Bill McGhee and a few other deputies saw Marc coming out of the kitchen at the Detroit House of Corrections with blood on his hands and pants. Marc said that he had been helping the cook kill chickens. McGhee did not report this incident and did not believe that it was indicative of a propensity for violence. (Tr 5/2/89, 113-119)

Wedding Incident.

During Marc and Diana's May, 1977 wedding reception, Marc drank champagne from his shoe and insisted that the band play the "Marine Corps Hymn." He became verbally abusive to the band when they refused to play it. (Tr 5/8/89, 85)

Belleville Restaurant Incident.

Sometime between 1978 and 1980, Marc intervened in a fight between a couple in a Belleville restaurant while he was off-duty. (Neither the nature of the fight nor the nature of Marc's intervention was detailed at trial.) The Belleville police notified the Sheriff's Department of the incident and the Department conducted an investigation. No complaint was filed by the couple involved in the incident and, after its investigation, no action was taken by the Department against Marc Davis. (Tr 5/2/89, 48-49, 52-54; Tr 5/16/89, 58-59)

Prisoner Beating Incident.

Sometime between 1978 and 1980, Deputy Teresa Vasquez observed a prisoner being placed in a cell near the intake area where problem prisoners were isolated. She saw Marc enter the cell and heard blows being exchanged between the two men. Deputy Vasquez never reported the incident, although she knew that Department rules forbade such conduct and that she had a duty to report it. She explained that she thought that she would not have been able to function effectively with the male deputies if she made a report. Although Deputy Vasquez stated that several other deputies were present in the area, no one else testified to this incident at trial and the prisoner did not file a complaint or otherwise report the incident. (Tr 4/25/89, 176-179; Tr 4/26/89, 62-64, 68, 151-152, 164-167)

Locker Incident.

Sometime between 1978 and 1981, Deputy Louis Elias noticed a bullet hole near the bottom of his department locker. His briefcase, which had been inside the locker, was damaged as a result. No one had witnessed or heard a gun discharge in the locker room but Deputy Elias believed that Marc Davis was responsible. When he confronted Marc and asked him to pay for the briefcase, Marc did not admit responsi-

bility but did pay for the briefcase. Deputy Elias did not file a report and explained that Marc had paid him for the briefcase and that he did not have enough information to file a report. (Tr 4/25/89, 146-156)

Inmate Incident.

Sometime between 1978 and 1982, Marc Davis was hit by an inmate while on duty. The inmate was taken to the intake area of the jail annex where Deputy William Wensko was working. The supervisor, Lt. Lewis Bryant, ordered Deputy Wensko not to allow Marc to come near the prisoner. When Marc arrived soon thereafter he was loud and agitated because he wanted to have an "understanding" with the inmate. When told that Lt. Bryant had ordered that he not have contact with the prisoner, he left the area without further incident. Deputy Wensko did not report the incident because Marc did not get near the prisoner and went back to his assignment without problem. (Tr 4/25/89, 32-34,57-59, 69)

Cafeteria Incident.

Sometime between 1978 and 1982, Deputy Wensko observed Marc talking to another deputy, Bill Osbourne, in the jail annex cafeteria. Marc pulled out his gun and put the barrel against Deputy Osbourne's buttocks. Deputy Wensko did not know what was going on but he stated that Marc did not appear to be "kidding around". He did not report the incident because "it was none of his business", he did not want to "make waves" and he did not consider the incident "way out of line". (Tr 4/25/89, 30, 35, 60-61, 63, 69)

Prisoner Petition Incident.

In February of 1980, Marc filed an incident report concerning an inmate, Lewis Smith, because Mr. Smith refused to put on his shirt and pants for breakfast, was verbally abusive to Marc, and incited the other inmates. Mr. Smith and 14 other inmates responded

with a handwritten "formal grievance", which they submitted to the Department. The inmates complained that Marc treated them in a demeaning and degrading manner, was neglectful of his duties, changed the rules to fit his whim, would not allow them to watch television one night, and would not allow Mr. Smith to have breakfast because he was not properly dressed. (Tr 4/27/89, 56, 71-74; Exhibit 16) Lt. Bryant filed a report on the matter, recommending that no disciplinary action be taken against Mr. Smith but that he and another prisoner be relocated. He also noted that inmates were not required to be dressed for breakfast and that "normal procedures were not followed". (Exhibit 16; Tr 4/27/89, 76) Peter Wilson, the jail administrator, recommended further investigation into the prisoners' petition and, in the meantime, assigned Marc to the master control area where he would have limited contact with inmates. (Tr 4/27/89, 74-77, 86)

Choir Practice Incident.

Deputies Wensko and Gulick testified to an incident that occurred in late 1980 or early 1981 during "choir practice", i.e., a social gathering of deputies and civilians after work, which sometimes occurred outside on county property. (Tr 4/25/89, 36-37, 61-62; Tr 5/8/89, 83) The deputies testified that they, Marc, and a few other deputies met after work at the baseball field near the jail annex and were drinking. Officer Wensko testified that Marc was drinking, although Deputy Gulick was not sure. At some point, Marc rode his personal motorcycle up a nearby steep hill and collided into either a cement wall or a pile of debris at the top of the hill. Marc was not injured. No report was made of the incident. Officer Wensko explained that there was nothing to report because Marc's conduct was not "way out of line", did not constitute conduct unbecoming an officer, and the incident had no effect on Marc's ability to perform his job. (Tr 4/25/89, 37-39, 62-63; Tr 5/8/89, 83-84)

Pay Check Incident.

Sometime prior to May of 1981, Deputy Claire Parnell was working with Diana Davis at the downtown jail when Marc approached her and asked for her paycheck. When Diana refused, Marc stated that he would "beat her ass" if she did not give him the check. Deputy Parnell said that Marc was not going to beat Diana in front of her and when Marc did not leave, Deputy Parnell telephoned an unnamed sergeant who told her to put Marc on the phone. Marc left after speaking to the sergeant. There was no written report of this incident. (Tr 5/2/89, 105-107, 111, 166-167)

Workers Compensation Incident.

In 1981, Diana picked up Marc at work and took him to the hospital because he had broken his hand when he hit a car window. Marc was not on duty at the time, but he did receive workers compensation. Diana did not observe how Marc injured his hand and no other witness testified to the incident. (Tr 5/4/89, 71-72, 117-118; Tr 5/16/89, 81)

In addition to these specific incidents during his 8 year career with the Sheriff's Department, plaintiff also produced evidence concerning Marc's nickname and personality. Marc was nicknamed "Macho" and was described by his co-workers as cocky, arrogant, self-confident and abrasive. A few co-workers stated that Marc sometimes spoke demeaningly to inmates and other deputies, although no one reported that attitude problem to supervisors. He was also described as a deputy who always "went by the book", i.e., he insisted that others follow the rules and he would not give people a break if they violated them. (Tr 4/26/89, 130-131, 150-151, 172-173; Tr 4/27/89, 45-47, 69-71, 79-80; Tr 5/1/89, 55; Tr 5/2/89, 22; Tr 5/8/89, 29, 81, 154-155, 168-169)

Alleged Policies and Customs of the Department

Pre-Hiring Psychiatric Screening

The process of hiring deputies for the Sheriff's Department is handled both by the Civil Service Commission and the Sheriff's Department. Civil Service processes the applications for deputy positions, conducts written tests, and compiles the list of top candidates from which the Sheriff's Department must select. The Sheriff's Department then conducts physical agility tests, performs an extensive background check, and orally interviews each candidate. After the applicant is hired, he/she is sent to a police academy to receive the training necessary to become a state-certified deputy sheriff. (Tr 4/20/89, 28-29, 32-33; Tr 4/24/89, 8-11, 67-69; Tr 5/3/89, 13-15, 36)

When Marc Davis was hired in the mid-1970's, mandatory psychiatric screening of deputy candidates was not conducted by Civil Service, the Sheriff's Department, or the police academy. It is/was not mandated by the state. (Tr 4/19/89, 80; Tr 4/24/89, 12-14, 37-41, 56; Tr 5/3/89, 33-35)[2]

Annual Written Performance Evaluations

At least two written performance evaluations of deputy sheriffs are conducted by the Sheriff's Department during their first year of probation and, in fact, two such evaluations were prepared during Marc Davis' probationary period. (Tr 4/24/89, 17-20; Tr 5/3/89, 15-16; Tr 5/10/89, 70) During Marc's career the Sheriff's Department did not perform periodic written evaluations of deputies after they successfully completed their proba-

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2 None of the experts who testified at trial opined that Marc Davis would have been deemed an unsuitable candidate for police work if he had been subjected to pre-hiring psychiatric screening. Defendant's expert stated that he would not have been disqualified while plaintiff's expert noted that Marc did not begin developing problems until after he was hired. (Tr 5/15/89, 20; Tr 5/8/89, 64)

tion. Although the Department had tried to institute such a procedure in the late 1970's, the deputies' union successfully challenged the procedure as discriminating against uniformed personnel and the Department was not able to adopt the evaluation procedures used by other County departments until 1986 or 1987. (Tr 4/24/89, 17-21, 56-58, 70-72, 91; Tr 5/3/89, 15-16) The Department did have a policy of supervising, monitoring and evaluating deputies on a daily basis, requiring that all significant problems be reported and investigated, and taking appropriate disciplinary action when warranted. (Tr 4/20/89, 14; Tr 4/24/89, 38, 58-61, 78-79, 158)[3]

Specific Counseling Program for Deputy Sheriffs

There was no dispute that at all relevant times a counseling program was available for deputy sheriffs. Prior to 1986, however, the counseling program was not exclusively geared to deputy sheriffs but was a county-wide counseling program — the Employees Assistance Program (EAP). (Tr 4/20/89, 7-8, 11, 62-67, 97-99; Tr 5/10/89, 73) The EAP was staffed by volunteers, who would refer any county employee (including deputies) to the type of professional counseling services they required (e.g., financial, alcohol and substance abuse, psychological/psychiatric counseling, etc). Deputies who sought assistance through the EAP were encouraged to use, and in some cases were directly referred to, the Detroit Police Department's counseling program, which was operated by the Multi-Resource Center

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[3] **Although plaintiffs' expert testified as to the desirability of written performance evaluations, there was no state or federal regulation mandating them and no specific evidence was presented by plaintiffs as to how such evaluations would have uncovered more information about Marc Davis than the Department had. Defendant's law enforcement expert concluded that even if there had been written performance evaluations, they would not have provided sufficient information to warrant removing Marc's police powers. (Tr 5/16/89, 52-53)**

(MRC) and was law enforcement officer specific counseling. (Tr 4/19/89, 99-100; Tr 4/20/89, 15-16, 77-80; Tr 4/25/89, 123)

Plaintiffs contended that the Sheriff's Department, which, in 1986, completed its negotiations and funding for a counseling program run by MRC and geared exclusively to deputy sheriffs, should have adopted such a program earlier. However, the only significant differences between the EAP and MRC programs established at trial were (1) the contact person for the latter program was an MRC employee, and (2) deputy sheriffs were always referred to professionals who were acquainted with the unique needs of police officers. Under either program, the Sheriff's Department could require deputies with specific problems that affected their work to go to counseling and supervisors were trained to look for abnormal behavior which might indicate problems. Under either program, referrals to counseling would not be required for purely personal problems which did not affect job performance. (Tr 4/19/89, 101-102, 146-149; Tr 4/20/89, 5-16, 84, 98; Tr 5/10/89, 72)

Plaintiffs presented no evidence concerning the effectiveness of the EAP. The only testimony in this regard was that the rate of usage of EAP and MRC services was nearly identical, with 3-5 referrals per month. (Tr 4/25/89, 135, 140)

"Code of Silence"

The Sheriff's Department officials and supervisory personnel, as well as the parties' experts, recognized that all police officers have a very natural inclination not to "snitch" on fellow officers because they are a very close group of people who work together in potentially dangerous situations where their partners could save their lives. (Tr 4/20/89, 52-53, 165-168; Tr 4/24/89, 71-72, 154, 161-163; Tr 4/25/89, 78-79; Tr 4/26/89, 103, 144-145, 154-155; Tr 4/27/89, 63, 82-84; Tr 5/8/89, 14-15, 162-163; Tr

5/16/89, 50) Plaintiffs referred to this natural propensity as the "code of silence".

However, there was no evidence that the Sheriff's Department had a formal written policy adopting or condoning a "code of silence" and all of the departmental personnel testified that there was no informal custom or policy of ignoring or condoning officer misconduct. (Tr 4/20/89, 165-166; Tr 4/24/89, 97, 137. 161-164, 170-171; Tr 4/25/89, 155; Tr 4/26/89, 104, 154-155, 163-164; Tr 4/27/89, 78-79, 82-84; Tr 5/15/89, 87-88) In fact, the Sheriff's Department had specific portions of their training program and written documents devoted to teaching supervisors how to observe and deal with deputies, ascertain problems, and report accurately, and this training of supervisory personnel was consistent with the recommendations of plaintiffs' law enforcement expert. (Tr 4/20/89, 72-73,168-169; Tr 4/24/89, 155, 162-163; Tr 4/26/89, 148-149)

Defendant's law enforcement expert observed that if the Sheriff's Department had a "code of silence", there would be no requirements for reporting misconduct or disciplining officers. (Tr 5/26/89, 102-103) However, the undisputed evidence demonstrated that the department required that all misconduct be reported and investigated, with appropriate discipline when warranted. (Tr 4/20/89, 41-43, 106-107; Tr 4/26/89, 154-155; Tr 4/27/89, 52, 83-84; Tr 5/10/89, 72) The testimony established that reports and investigations were specifically required for, *inter alia*, serious verbal confrontations with beating of prisoners,[4] prisoner complaints,[5] accidental/intentional discharges of weapons,[6] incidents involving deputy

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4 Tr 4/26/89, 63-64, 67, 142-143; Tr 4/27/89, 53-54, 87-89; Tr 5/10/89, 71.

5 Tr 4/26/89, 151-153, 165-167, 175.

6 Tr 4/20/89, 48-50, Tr 4/24/89, 83-86, 99-100; Tr 4/25/89, 150-151, 156-157, 165-167; Tr 4/26/89, 137-138; Tr 4/27/89, 49-50.

sheriffs which were reported by other police agencies,[7] and drinking on the job or on county property.[8] The Department also had a policy of reporting off duty behavior that could be considered conduct unbecoming an officer.[9]

At best, plaintiff presented evidence from its law enforcement expert that he had ascertained in his discussions during training seminars with supervisors from the Wayne County Sheriff's Department that they were just trying to get through the day, and did not want to hear, look for, or worry about anything. (Tr 5/8/89, 4, 88-90, 95-97) One Wayne County deputy sheriff felt that it was useless to file complaints against other deputies, or that certain supervisors did not want to be bothered with complaints unless they were serious. However, that deputy admitted that departmental policy was to report misconduct and that an investigation would occur if a report were filed. (Tr 4/25/89, 56, 65-66, 71-72) Another deputy complained that her supervisor did not take any action when a deputy once pulled a gun on her for turning off a radio. (Tr 4/25/89, 190; Tr 4/26/89, 64-65, 94, 97-98) On another occasion, a supervisor stopped a fight between an inmate and a deputy, but no further action was taken. (Tr 4/25/89, 179-180) These two incidents were the only ones presented concerning a supervisor not reporting misconduct observed which arguably should have been reported.

As to complaints concerning deputies physically abusing their spouses, the Department's supervisory personnel agreed that if Diana Davis had reported the incidents of physical abuse and requested the Department to take action against Marc, the Department would have had a duty to investigate the matter and take

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7 Tr 4/20/89, 37-38; Tr 4/25/89, 20-21.

8 Tr 4/20/89, 51; Tr 4/24/89, 157, 173.

9 Tr 4/20/89, 13-14, 75; Tr 4/25/89, 69.

appropriate counseling or disciplinary action. (Tr 4/20/89, 5, 84, 106-107; Tr 4/24/89, 171, 173; Tr 4/25/89, 19-20) However, that did not occur because Diana did not want the Department to know of her domestic problems.

The supervisory personnel further agreed that the Department would have had a duty to investigate, counsel, and perhaps discipline Marc if the Department had learned that Diana was being physically abused, even if Diana did not request such assistance. (Tr 4/19/89, 115; Tr 4/20/89, 41-43, 84, 106-107; Tr 4/25/89, 23-24; Tr 4/27/89, 66, 78, 92; Tr 5/8/89, 18-19, 100-101; Tr 5/15/89, 76; Tr 5/16/89, 14-15, 84-85, 119-120) However, none of Marc and Diana's problems were reported up the chain of command prior to the shooting. (Tr 4/20/89, 19-21, 43-44, 83; Tr 4/25/89, 75, 167-168) When, after the shooting, the Department learned of the various rumors involving Marc Davis, an investigation was conducted to learn why those rumors did not flow up the chain of command. (Tr 4/20/89, 46-47, 85-86)

Verdict and Appeal

The jury returned a verdict imposing 42 USC § 1983 liability on defendant and awarding $803,416 to Diana Davis, $651,702 to Kimberly Wilson's estate, and $50,000 to Todd Wilson. The judgment was entered on June 13, 1989, and the plaintiffs' motion for additur, or in the alternative a new trial, was denied by order dated June 13, 1989. Defendant's motion for judgment notwithstanding the verdict or new trial was denied by order dated October 13, 1989.

Defendant thereafter filed a claim of appeal to the Michigan Court of Appeals, contending that it was entitled to judgment in its favor because the plaintiffs' proofs were insufficient to establish *any* of the requisite elements of a 42 USC § 1983 cause of action, that the trial court erred in its instructions to the jury regarding these elements, and that the trial court erred by

excluding from evidence a videotape of a television interview with Diana Davis. The plaintiffs filed a cross-claim of appeal, contesting the adequacy of the jury's verdict and the court's award of attorney fees, as well as the trial court's orders granting summary disposition to Wayne County and denying plaintiffs the right to assert a cause of action for violation of the Michigan Constitution.

After extensive briefing and oral argument, the Court of Appeals released its unanimous decision on September 20, 1993, reversing the judgment entered against defendant and remanding the case for entry of judgment in its favor. Although the Court found that any constitutional deprivation was committed "under color of state law", it did not specifically address defendant's argument that there had been no *constitutional* violation. However, noting that "liability for an officer's off-duty conduct that results in death or bodily injury to citizenry may only be imposed where that officer's conduct is directly related to a policy, or lack of policy, adopted with deliberate indifference to the rights of citizens", the Court reversed the judgment entered against defendant, specifically finding that (a) plaintiffs had failed to produce sufficient evidence of a relevant policy; (b) plaintiffs had failed to produce sufficient evidence of deliberate indifference and had, at most, produced evidence of negligence; and (c) plaintiffs had failed to produce sufficient evidence of a causal link between the harm suffered by the plaintiffs and any alleged policy. Having so concluded, the Court did not consider defendant's other allegations of error.

The Court of Appeals then considered and rejected each of the issues raised by plaintiffs on their cross-appeal, including plaintiffs' argument that they should have been allowed to add a count against defendant based on an alleged violation of the Michigan Constitution: "In this case, having concluded that the actions of defendant were not the cause of whatever violations may have occurred, the question whether a state con-

stitutional tort exists independent of this § 1983 claim is also moot."

Plaintiffs have now filed a Delayed Application for Leave to Appeal, contending that the Court of Appeals erred when it concluded that plaintiffs had failed to prove the existence of a relevant policy or custom, erred when it concluded that plaintiffs had failed to prove that defendant was deliberately indifferent to constitutional deprivations, and erred when it concluded that plaintiff had failed to prove that the harm suffered by plaintiff was caused by any alleged policy or custom. Plaintiffs further contend that the Court of Appeals erred when it concluded that, pursuant to the opinions rendered in *Smith* v *Department of Public Health*, 428 Mich 540 (1987), a failure of proof under 42 USC § 1983 would also constitute a failure of proof under any cause of action under the Michigan Constitution.[10]

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10 Although it believes that this Court should deny plaintiffs leave to appeal, in the event that leave is granted to consider the elements of a § 1983 cause of action, defendant has filed a cross-application for leave to appeal asking that it also review the elements of "color of state law" and "constitutional" deprivation.